light of that restatement. Once that is done, the ruling below emerges not only as an eminently correct decision but as one presenting no basis for review by this Court.

RESTATEMENT OF THE CASE

This is the third mandamus proceeding instituted by the petitioner, a patent owner, against District Judge Watkins since he began presiding over the intervenor's declaratory judgment action against the petitioner. That action, filed more than five years ago, challenges the validity of the petitioner's patent issued in 1960, relating to pneumatic tires and tread stock, and pertains to certain other related issues. Actual trial of the declaratory judgment action began before Judge Watkins on April 15, 1964, and is now "hopefully" nearing completion. More than two years and five months (less summer recesses) of trial have now elapsed, resulting in a transcript of nearly 36,000 pages (in addition to thousands of pages of exhibits). And as the Court of Appeals noted (Pet. App. p. 7a), "several key witnesses . . . [have] died, and it . . . [is] questionable whether several other witnesses would still be available."

The present mandamus proceeding is frankly designed (see Pet. p. 11) to disqualify Judge Watkins from further participation in this still-pending trial. That effort, as the Court of Appeals noted (Pet. App. p. 9a), involves no accusation of personal bias or prejudice in the Judge's conduct of the case. The claimed disqualification stems, rather, from certain steps taken by Judge Watkins in response to two mandamus actions filed against him in the Fourth Circuit by the petitioner.

1. The First Mandamus Proceeding

Petitioner's initial motion to transfer was filed on April 13, argued on July 6 and denied July 24, 1961. On September 6, 1963, shortly prior to the time for commencement

of the declaratory judgment trial, petitioner again moved to transfer the action to a federal court in Ohio with the hope of consolidation with a similar case involving the same patent. Judge Watkins denied the motion. Petitioner's true purpose was stated by its counsel as follows:

> ". . . (Mr. Merriam) . . . I want to agree with Mr. Irons on one thing . . . And that is, he said that we have consistently sought to have this case in one way or another consolidated with the Cleveland case and tried there, and I agree with him. I don't think I have hidden anything about it. I have tried in every way that I thought of and maybe some way that nobody else has thought of before to do it. At any rate, . . . I have tried" (Tr. 25,806-7).

The petitioner sought review of that denial by filing a mandamus petition in the Fourth Circuit.

As the nominal respondent in that mandamus action, Judge Watkins followed a custom of long standing and consulted with the then United States Attorney (now Senator Tydings) concerning representation of the Judge before the Fourth Circuit. Because of the complexity of the case and the great amount of time needed to familiarize the United States Attorney with the matter, it was agreed that it would be more logical to have an attorney already familiar with the record represent the Judge. Mr. Benjamin C. Howard, one of the counsel for the intervenor herein (Firestone Tire & Rubber Co.), was accordingly appointed. Mr. Howard then prepared a chronological recitation, with record references, of the reasons for the Judge's decision with reference to the transfer motion. This recitation, checked for accuracy and approved by the Judge, was filed in the Fourth Circuit as the Judge's answer. Mr. Howard later argued orally before the Fourth Circuit on the Judge's behalf, making plain that he was "appearing only for Judge Watkins" and was "authorized"

to state "a certain opinion for Judge Watkins" (See Pet. p. 7; Pet. App. pp. 12a-13a).

The Fourth Circuit, after consideration of the briefs and arguments, affirmed Judge Watkins' action respecting the transfer and dismissed the mandamus petition. *General Tire & Rubber Co. v. Watkins*, 326 F. 2d 926 (C.A. 4). This Court denied certiorari. 377 U.S. 909.

2. The Second Mandamus Proceeding

In January of 1964, prior to the commencement of trial, the petitioner filed in the District Court a belated demand for a jury trial pursuant to Rules 38(a) and 39(b) of the Federal Rules of Civil Procedure. Judge Watkins denied the request. Thereafter petitioner filed a second mandamus petition in the Fourth Circuit, seeking review of the jury trial denial. This time the Judge was represented primarily by the present United States Attorney Thomas J. Kenney. The answer to this mandamus was entirely the product of the Judge, having been dictated to the Court Reporter in chambers in the presence of Mr. Howard, Mr. Kenney and the Judge's Law Clerk. Neither Mr. Howard nor Mr. Kenney, other than signing the answer with the Judge, took any further part in the proceedings on behalf of the Judge and no argument on behalf of the Judge was presented in the Court of Appeals (See Pet. App. pp. 13a-14a). Mr. Howard was also named as counsel to the Judge.

The Fourth Circuit denied the mandamus petition and affirmed the refusal to grant a jury trial. *General Tire & Rubber Co. v. Watkins*, 331 F. 2d 192 (C.A. 4). Certiorari was denied by this Court. 377 U.S. 952.

3. The Affidavit of Personal Bias or Prejudice

On November 20, 1963, while the first mandamus petition was *sub judice*, petitioner had filed an affidavit of personal

bias or prejudice in support of a demand for Judge Watkins' disqualification under 28 U.S.C. §144. Included among the charges in the affidavit was an assertion that the Judge had acted as an "advocate" for Firestone Tire & Rubber Co. It is significant that no complaint was made when the affidavit of personal bias or prejudice was filed with respect to Mr. Howard's participation in the filing of the answer or his argument in the Court of Appeals, which had taken place prior to the filing of the affidavit and was, of course, well known by the petitioner.

Judge Watkins declined to disqualify himself in light of this affidavit. The Fourth Circuit, in dismissing the second mandamus petition, declined an "invitation" to pass upon the sufficiency of the affidavit of prejudice, stating that the Judge's refusal to disqualify himself "is not now appealable as a final order." 331 F. 2d at 198. There the matter now rests, the affidavit of personal bias or prejudice forming no part of the present mandamus proceeding.

4. The Third Mandamus Proceeding

On two occasions during the course of the trial in the District Court, while discussing various other matters, the petitioner called Judge Watkins' attention to the recent ruling of the Third Circuit in *Rapp v. Van Dusen*, 350 F. 2d 806. Petitioner takes the position that merely calling attention to that decision was sufficient to obtain a ruling as to the Judge's qualification to sit in the light of 28 U.S.C. §455 (See Pet. p. 8). No formal motion for disqualification was ever filed, and the intervenor herein was never given any opportunity to brief or argue the matter in the District Court (See Pet. App. p. 18a).

Judge Watkins, in the absence of a formal motion, made no ruling on the effort to disqualify him under 28 U.S.C. §455.

Without further ado, petitioner filed the instant mandamus action in the Fourth Circuit on January 4, 1966, seeking an order disqualifying Judge Watkins under 28 U.S.C. §455 solely on the basis of his actions several years before in connection with the first two mandamus proceedings. This time Judge Watkins filed his own answer to the petition (Pet. App. pp. 11a-19a), and was not otherwise represented before the Fourth Circuit. In this answer Judge Watkins stated that he "would have preferred the filing of a formal motion . . . since plaintiffs [Intervenor Firestone] would probably have asked for and been granted an opportunity to brief and argue the motion; respondent's attention would have been directed thereto; and an opportunity would have been afforded respondent to file an opinion with respect thereto,". Judge Watkins further stated that "Had a formal motion for disqualification been made, respondent is confident he would have denied it. Presumably petitioner has stated its case as forcefully as it can in the instant petition; which, however, is not persuasive to respondent" (Pet. App. 18a).

In denying this third mandamus petition, the Fourth Circuit said:

> "We find no impropriety in the Judge's conduct and perceive no justification for disqualifying him under the statute relied on by General Tire" (Pet. App. 9a).

The Fourth Circuit also made the following determinations:

(1) In agreement with certain of the Third Circuit's views in *Rapp v. Van Dusen*, 350 F. 2d 806, the Fourth Circuit found "that it is an undesirable practice to name the District Judge as an active party where mandamus proceedings are employed to test his decision on a motion to transfer or — as in the second mandamus in this case — a

demand for jury trial." The court, in order "to avoid even the appearance of impropriety in such cases", accordingly amended its own Rule 31 to provide that henceforth a District Judge will not be required in such situations to file an answer or submit a brief and that his failure to do so will not be deemed an admission of any allegation in the mandamus petition. The new rule further provides that the prevailing party in the District Court will be automatically treated as an intervenor in the Fourth Circuit mandamus proceedings (Pet. App. p. 8a).

(2) The Fourth Circuit further ruled that 28 U.S.C. §455, which bars a judge from participation in a case where he has been "of counsel," is directed primarily at the Judge who was of counsel in a matter prior to his appointment to the bench. The statute, said the court, is not concerned with the Judge who "merely reviews and makes suggestions concerning the papers prepared by an attorney for one of the parties, acting on the Judge's behalf" (Pet. App. p. 9a). Hence, concluded the court, "we find no impropriety in the Judge's conduct and perceive no justification for disqualifying him under the statute relied on by General Tire" (Pet. App. p. 9a).

Judge Watkins was not represented by counsel in the Fourth Circuit Court of Appeals and has not appeared befort this Court or filed any pleadings responsive to the petition filed herein.

RESTATEMENT OF QUESTIONS PRESENTED

1. Whether the Fourth Circuit, having amended its procedural rules of court so that henceforth District Judges "will not be required to file an answer or submit a brief" in mandamus actions designed to review their judicial actions, abused its discretion in not applying its rule retroactively so as to disqualify a District Judge where (a) the

District Judge committed no impropriety in responding to prior mandamus petitions, (b) disqualification at this point would disrupt and prejudice a long and complex trial now under way and greatly advanced, (c) disqualification is sought solely as a reward or incentive for the party initiating the proceeding in which the new rule is announced, and (d) no injury to that party has been or can be shown.

2. Whether a District Judge, named as a respondent in mandamus proceedings testing his judicial actions, was compelled to disqualify himself under 28 U.S.C. §455, as having been "of counsel", or "so related to or connected with any party or his attorney as to render it improper" to sit, where he followed the then established practice of (a) appointing as his attorney in the mandamus actions counsel for the prevailing party in the District Court, and (b) reviewing and making suggestions concerning the papers prepared by that attorney.

THE WRIT SHOULD BE DENIED

The decision below, viewed in light of its factual content and the issues involved, presents no special or important reason for granting the writ of certiorari. There is no conflict with any other decision of any other court. And there is no question of wide public interest presented.

This mandamus proceeding is brought admittedly "to disqualify Judge Watkins" and is in effect but another of a long chapter of efforts in which the petitioner has engaged since April of 1961 to avoid a trial and adjudication in this complicated patent suit before District Judge Watkins and is an effort to re-open the matter of transfer to Cleveland and possible consolidation, which has been repeatedly and finally adjudicated.

1. The promulgation and application of the new rule announced in this case concern matters peculiarly within the competence and discretion of the Fourth Circuit.

The Fourth Circuit's amendment of its own procedural rules regarding a District Judge's participation in mandamus proceedings presents no basis for invoking this Court's review powers. Nor is there any reason for this Court to second-guess that court's determination that the circumstances of this case do not warrant the disqualification of Judge Watkins.

The Rule amendment promulgated below, petitioner concedes (Pet. p. 10), is an appropriate response to a problem which has long plagued District Judges named as respondents in mandamus proceedings designed to review their judicial acts. Apart from the serious question as to the availability of mandamus to secure such review, see *La Buy v. Howes Leather Co.*, 352 U.S. 249, such a procedure has long been recognized as having "the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him." *Ex parte Fahey*, 332 U.S. 258, 260; *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 384-385.

To eliminate that "unfortunate consequence" in mandamus actions originating in this tribunal, this Court in revising its Rules in 1954 adopted Rule 31(3). In language similar to that adopted here by the Fourth Circuit, Rule 31(3) of this Court's Rules provides that the respondent judge need not contest or respond to a mandamus petition and that all other parties are deemed to be respondents in this Court. Thus was eliminated the *ex parte* nature of mandamus proceedings in this Court, making

them adversary in nature and directed against the real parties in interest. See Wiener, The Supreme Court's New Rules, 68 Harv. L. Rev. 20, 70-72 (1954).[1]

The identical rule has been proposed for adoption as part of the Uniform Rules of Federal Appellate Procedure. See 34 F.R.D. 263, 294-295.[2] When if those Rules become effective the amendment promulgated here by the Fourth Circuit will in effect be reflective of the uniform judicial response to the procedural problem posed by naming District Judges as respondents in mandamus petitions. In these circumstances no further action in this Court is warranted at this time.

Nor is there any need for this Court to determine if the prophylactic rule announced by the Fourth Circuit should be applied retroactively so as to disqualify Judge Watkins from further participation in this case. The employment by a District Judge of counsel to defend himself in a mandamus action, while said to be an "unfortunate consequence

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[1] As Professor Moore has stated: "In the bulk of cases the lower court has no more interest in upholding the questioned order than it has in upholding one of its appealable orders; the interest is professional, not legal. In these cases the judge is really a 'formal' party. The litigant in whose favor the order runs is the real party in interest; and quite generally desires and is permitted to intervene in the appellate court in support of the questioned order. Appellate practice should recognize these facts of life." 6 Moore's Federal Practice ¶54.10[2], pp. 72-73 (2d ed. 1965).

[2] Rule 20(b), as proposed in the 1964 Preliminary Draft by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, provides with respect to mandamus petitions:

> "All parties below other than the petitioner shall also be deemed respondents for all purposes. Respondents may answer jointly. If the judge or judges named respondents do not desire to contest the petition, they may so advise the clerk and all parties by letter, but the petition shall not thereby be taken as admitted."

See also *Rapp v. Van Dusen*, 350 F. 2d 806, 812-813, fn. 26 (C.A. 3).

of making the judge a litigant," *Ex parte Fahey, supra,* has never been deemed *per se* to be improper or to be a basis for disqualification. Time and again mandamus cases have reached this Court wherein judges have been represented here and in Courts of Appeals by counsel for the prevailing parties in the district courts. Not once has this Court indicated that there was any impropriety in such representation, however "unfortunate" it might be. See, e.g., *Ex parte Peru,* 318 U.S. 578; *Roche v. Evaporated Milk Association,* 319 U.S. 21; *United States v. United States District Court,* 334 U.S. 258; *Norwood v. Kirkpatrick,* 349 U.S. 29; *Platt v. Minnesota Mining Co.,* 376 U.S. 240; *Schlagenhauf v. Holder,* 379 U.S. 104.

There is nothing in the new rule adopted below, or in this Court's Rule 31(3), which condemns the practice in question. Such a rule seeks to avoid the problem created by the practice by realigning the parties, making it unnecessary for the judge to be represented if he does not so desire. But there is no basis for assuming that such representation, particularly one that arose before promulgation of the new rule, must be deemed to be outlawed or to justify disqualification.

The fact that the Third Circuit in *Rapp v. Van Dusen,* 350 F. 2d 806, promulgated a similar rule and then applied it retroactively to disqualify Judge Van Dusen constitutes no conflict with the determination below not to disqualify Judge Watkins. With reference to new procedural rules and new legal principles, a court "should avoid retroactivity as much as possible". *Addison v. Holly Hill Co.,* 322 U.S. 607, 620. Retroactivity, "even when permissible, is not favored," *Claridge Apts. Co. v. Commissioner,* 323 U.S. 141, 164. Thus, only the most compelling circumstances, outweighing the inequitableness implicit in retroactivity (*United States v. Lindsay,* 346 U.S. 568, 571), war-

rant retroactive use of a new rule. See *Johnson v. New Jersey*, 384 U.S. 719, 728-729.

Any determination to utilize a new rule retroactively must accordingly take into account the foregoing principles and must rest within the sound discretion of the promulgating court. See *S.E.C. v. Chenery Corp.*, 332 U.S. 194, 203. That discretion was exercised by the Third Circuit in *Rapp v. Van Dusen* in favor of retroactivity by virtue of the peculiar circumstances there present, it being clear that retroactivity at the pretrial stage visited no harm or injustice on any of the parties. 350 F. 2d at 814. But in the instant case, the Fourth Circuit was confronted with entirely different circumstances.[3] To disqualify Judge Watkins now would vitiate the lengthy trial record, including testimony of witnesses no longer available, and would destroy an enormous expenditure of time, effort and money by all parties in the case and by the District Court. Moreover, the effort to disqualify Judge Watkins comes long after the facts concerning his actions with respect to the prior mandamus petitions were first known to petitioner; and the effort itself represents but another attempt "to have this case in one way or another consolidated with the Cleveland case and tried there." Indeed, it may be said that petitioner is not so much concerned with "the appearance of impropriety" as with avoidance of trial and judgment by Judge Watkins.

In light of all these factors and in view of the complete absence of any improper action by Judge Watkins, the

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[3] In the *Van Dusen* case the question involved the disqualification of a judge with respect to reconsidering, by direction of this Court, the very motion that had given rise to the prior mandamus. In the instant case the rulings made by Judge Watkins were not the subject of remand for further consideration but were affirmed by the Fourth Circuit with petitions for certiorari denied in this Court.

Fourth Circuit reasonably concluded that its new rule should not be retroactively applied for disqualification purposes. Faced with the same circumstances, the Third Circuit would probably have reached the same conclusion. Thus, becomes apparent the absence of any real conflict between the Circuits that would justify review by this Court. The differing results stemmed not from differing principles but from differing circumstances, warranting differing application of the respective discretionary powers in the interest of justice.[4]

Indeed, even if the Fourth Circuit's rule of court were in conflict with the Third Circuit's rule, no ground for certiorari here exists. Differing procedural rules of the Circuits or differing interpretations or applications of a similar rule in effect in more than one Circuit have never been thought to create a basis for review or correction by this Court. Unless there is some Constitutional right at stake or unless there is some overpowering consideration involving the proper administration of justice in the Federal Courts at issue, appellate courts are free to adopt or apply their own distinctive rules of practice, differing though they may be. Uniformity comes only through voluntary action by the respective appellate courts or by the adoption of the proposed Uniform Rules of Federal Appellate Procedure.

Petitioner's complaint in this Court literally reduces itself to an assertion that it should secure the "benefits" of the new rule as a reward or "incentive" for having brought a mandamus action resulting in the promulgation of the

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[4] There is, of course, no conflict between the decision below and *Texaco, Inc. v. Chandler*, 354 F. 2d 655 (C.A. 10), in connection with the retroactive application of a new rule of the type here involved. The Tenth Circuit has promulgated no such rule and disqualification was there ordered under the provisions of 28 U.S.C. §455.

rule (Pet. pp. 10-11). Aside from the question as to whether disqualification was meant to be one of the "benefits" of the rule, disqualification is too serious a matter to be regarded as a reward or incentive for any private party. Certainly a desire for an incentive cannot qualify as grounds for review by this Court.

2. No important question or conflict of decision is involved in the Fourth Circuit's interpretation of 28 U.S.C. §455

There is no occasion to review the Fourth Circuit's determination that 28 U.S.C. §455 "is directed primarily at the Judge who was of counsel in a case before his appointment to the bench." The Third Circuit in *Rapp v. Van Dusen, supra,* expressly refrained from passing upon §455 or basing disqualification of Judge Van Dusen upon that provision. And the §455 disqualification in *Texaco, Inc. v. Chandler,* 354 F. 2d 655 (C.A. 10), turned upon entirely different facts, counsel for one of the litigants representing the District Judge not in a mandamus action but in a concurrently pending private damage suit. There is thus no real or even claimed conflict over the interpretation of §455 relative to a District Judge's defense of his legal actions in mandamus suits.

The Fourth Circuit's interpretation of §455 is so plainly correct in the circumstances of this case as to leave no important question worthy of this Court's review. Obviously, a District Judge who did no more than follow a long-established custom of designating an attorney for the prevailing litigant to represent him in a mandamus assault upon his judicial actions is not "of counsel" to that litigant; nor is he necessarily so connected with that party or its attorney as to render it improper for him to sit on the trial.

Proof of those conclusions is to be found in the extended history of just such representations in mandamus proceedings without the slightest question ever having been raised as to any resulting disqualification, under §455 or any other provision of law. As already indicated, pp. 9, 11, *supra*, many mandamus cases have reached this Court wherein District Judges have been represented by counsel for the prevailing parties. So well established was that practice that it has been said that in such cases "the judge or court is *normally*, though not necessarily, represented by counsel for the party opposing the petitioner below, who is, of course, the real opposing party." Stern and Gressman, Supreme Court Practice, Sec. 10-8, pp. 328-329 (3rd ed. 1962) (emphasis added). And that normal practice flourished and developed while §455 was an integral part of the United States Code; indeed, §455 was reenacted as late as 1948, long after the practice in question had been established. See *Fourco Glass Co. v. Transmirra Corp.*, 353 U.S. 222, 225-228.

In short, nothing in the language or history of §455 suggests that it was designed to affect this established procedure which many District Judges have felt compelled to follow. The new procedure merely gives the District Judges an opportunity to avoid the unfortunate aspects of seeking representation in situations where they are not real parties in interest. But the new rule in no way reflects upon the propriety of the old practice or effects any amendment to §455.

Disqualification in this case thus must depend upon an assessment of the peculiar circumstances involved. That assessment has been made by the Fourth Circuit, and no reason has been suggested why this Court should review that court's conclusion that there is no justification for disqualifying Judge Watkins. The soundness of that con-

clusion is in no way diluted by petitioner's frivolous due process claim, premised upon *In re Murchison*, 349 U.S. 133, a case involving an entirely different situation. The representation of Judge Watkins having been fully explained by him and having been found to contain no elements of impropriety, further inquiry into the details of that representation can hardly rise to the level of a constitutional right.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 393

THE GENERAL TIRE & RUBBER COMPANY,
Petitioner,

vs.

THE HONORABLE R. DORSEY WATKINS, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF MARYLAND,
Respondent,

and

THE FIRESTONE TIRE & RUBBER COMPANY,
Intervenor.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

PETITIONER'S REPLY TO BRIEF FOR THE INTERVENOR IN OPPOSITION.

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PETITIONER'S REPLY TO BRIEF FOR THE INTERVENOR IN OPPOSITION.

Intervenor's brief in opposition misstates the issues and some of the facts. This brief will attempt to rectify only the more important misstatements.

The Improved Practice in the Third and Fourth Circuits Came Only as a Result of Proceedings Brought by Litigants.

In the Court of Appeals, Firestone intervened without opposition, vigorously defended the *ex parte* conferences between the District Judge and counsel for Firestone, and opposed *any* change in the Rules for mandamus proceedings. Now, Firestone applauds the opinion below for changing the mandamus procedure and prohibiting the District Judge's use of and collaboration with counsel for one of the parties. Firestone says, however, that Rule 20(b) of the proposed Uniform Rules of Federal Appellate Procedure, when and if adopted, would accomplish this same result, even if General had not raised the issue by this proceeding. This is simply not the fact. Proposed Rule 20(b) is at best ambiguous in stating that "[r]espondents may answer jointly." (Intervenor's brief, p. 10.) Since the judge is still a respondent, it could be argued that Rule 20(b) would permit joint answers, and by inference, joint conferences, *ex parte*. Indeed, Firestone so argued before the Court of Appeals.

The beneficial changes in the Third and Fourth Circuits are the result of proceedings brought by litigants. There is no indication there would have been or will be such changes otherwise. Thus, it is important that the incentive for bringing such remedial proceedings not be destroyed by denying relief to the complaining party:

The Facts in This Case Add to the Appearance of Impropriety.

Firestone contends that the Court below found no impropriety in the judge's retaining and conferring *ex parte* with counsel for one of the parties in the mandamus proceeding, *per se*. The Court did find and hold that this conduct, *per se*, led to the appearance of impropriety, however, and banned the conduct in the future. The following facts in this case add to the appearance of impropriety and the inherent unfairness of *ex parte* consultations:

(a) An affidavit of personal bias or prejudice is in the parent litigation making the appearance of impropriety a very sensitive factor. *Firestone Tire & Rubber Co.* v. *General Tire & Rubber Co.*, 140 U. S. P. Q. 124 (D. C. Md., 1963).

(b) Judge Watkins attempted to interject the affidavit of prejudice into the jury trial mandamus proceeding by requesting the Court of Appeals to "consider and pass upon" its adequacy (Pet., p. 7).[1] The Court of Appeals refused the request. Mr. Howard had conferred with the Judge prior to the filing of this request (Pet., p. 7).

(c) Judge Watkins did not follow the custom in the District of Maryland of using the District Attorney as counsel in mandamus proceedings as he was advised by the Chief Judge, but chose one of the counsel for Firestone. (Pet. App. p. 12a.)

(d) Judge Watkins says that Mr. Howard, counsel for Firestone, made at least one unauthorized statement in his alter ego as the Judge's counsel before the

1. Throughout this brief, Pet. p. .... refers to petition for certiorari; Pet. App. p. .... refers to the appendix of the petition for certiorari; and Supp. App. p. .... refers to the Supplemental Appendix filed by petitioner in the Court of Appeals.